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SUBJECT: UNDERSTANDING THE AFGHAN SUPREME COURT

Classified By: Political Counselor Annie Pforzheimer, Reason 1.4 (b) and (d)

¶1. Summary: The Afghan Supreme Court is the highest court in the land, but rarely functions as a constitutional interpreter and in fact such a role is challenged by some experts. It mainly serves as an appellate court which exercises the fact-finding jurisdiction of a primary court. President Karzai will have an opportunity to replace six of the Court's nine, predominantly Shari'a educated members during the next five years. His appointments are unlikely to address the Court's many problems, which include Afghanistan's bifurcated (religious/secular) justice system.
End Summary.

Membership and Short History

¶2. (U) The nine-member Afghan Supreme Court (Steria Mahkama) was established by the 2004 Afghan Constitution pursuant to the 2002 Bonn Agreement. The Afghan President appoints the Court's members to a single ten-year term; their appointments are subject to confirmation by the Lower House of Parliament (Wolesi Jirga). The 2004 Constitution required that initial terms of office be for four, seven, or ten years so that appointments would not expire simultaneously. President Karzai's initial appointments were confirmed in 2006 and comprise the current sitting Court. He will have six appointments to make before the end of his administration in **¶2014**.

¶3. (U) The Court includes justices from Afghanistan's major ethnic groups, although Pashtuns predominate. Members, grouped according to term in office, include:

-- Four-year terms (exp. 2010): Chief Justice Abdul Salam Azimi (Pashtun); Justice Mohammad Qasem Dost (Pashtun); Justice Zamen Ali Behsudi (Hazara).

-- Seven-year terms (exp. 2013): Justice Abdul-Rasheed Rashid (Tajik); Justice Mohammad Alim Nasimi (Pashtun); Justice Abdul Aziz Aziz (Tajik).

-- Ten-year terms (exp. 2016): Justice Bahauddin Baha (Tajik); Justice Ghulam Nabi Nawayi (Uzbek); and, Justice Mohammad Omar Babrakzai (Pashtun).

Notably, only three of the nine justices - Azimi, Baha, and Babrakzai - studied secular law. The rest graduated from Kabul University's Shari'a Faculty. Justice Aziz is the former head of that faculty.

¶4. (U) The Afghan Parliament used its confirmation authority in 2006 to reject at least four Karzai nominees, including ultra-conservative former Chief Justice Fazl Hadi Shinwari and recently confirmed Justice Minister Habibullah Ghalib. Chief Justice Azimi replaced Shinwari, who was widely

unpopular because of his attempts to censor or ban film, radio, and television entertainment. (Note: Azimi had helped write the Afghan Constitution and, at the time of his appointment, was Karzai's legal advisor.) It is unclear why Ghalib, a PhD in Sharia law, was rejected in November 2006, but he was confirmed as Justice Minister by a two-vote margin on January 16, 2010.

How Does the Afghan Supreme Court Work? The Justices Say....

¶15. (C) According to Supreme Court Chief Administrator Qasem Halimi, the Court has both constitutional and appellate court status. He told us in a meeting January 14 that the Supreme Court reviews all cases that come before it on appeal; "no case is rejected," he said. To manage the casesload, however, few cases are reviewed by the full nine-member Court; rather, all appeals are sorted into one of four categories, and two judges and their respective clerks are assigned to each category. Baha and Dost decide criminal cases; Rashid and Babrakzai handle terrorism, narcotics, and anti-corruption; Nawayi and Behsudi handle commercial cases; and Aziz and Nasimi handle civil appeals. Chief Justice Azimi does not carry a regular case load, but is involved in deciding constitutional or politically sensitive cases. Halimi would venture no estimate of the number of appeals that come to the Court monthly but indicated that the Court sees a very large number of land dispute cases.

¶16. (C) Halimi said that appeals are not procedurally automatic, but must be requested by one of the parties to the suit. He said almost all criminal cases end up being appealed and, unlike in the U.S. system, the State - represented by the Attorney General's Office (AG) - is often the appellant. Appeals in civil cases come to the Court from the Ministry of Justice (MOJ). Whether a case is civil or criminal, non-governmental appellants (or their attorneys) must write a letter of appeal directly to the Court. The Court communicates its final decision in civil cases via the MOJ and in criminal cases via the AG. There is currently no method of codifying Supreme Court decisions so they may be used by lower courts as a guide for deciding future cases. According to Halimi, the MOJ is responsible for enforcing judgments in civil cases, the AG's office for criminal cases. (Comment: Notification to parties by mail is ineffective; the postal system does not provide certified receipt service or even door-to-door delivery throughout much of the country.

In addition, despite Halimi's assertions, Chief Justice Azimi himself has publicly said the Court lacks enforcement capacity. End Comment)

¶17. (C) Halimi said the appeal "hearing" itself consists of a complete review of the documents in the lower appellate court file. The lower appellate court file, in turn, represents a complete review (trial de novo) of the primary court record. (Note: all trials in Afghanistan are bench trials; there is no jury system.) However, Halimi also confirmed that the Court will accept new evidence from either party so long as the Court receives it before the review date. Because appeals are decided exclusively from file documents, the parties are not required or encouraged to be present. (Comment: This not only means that a Supreme Court review is, practically speaking, a trial de novo, but that evidence that has never been seen by the opposing party may ultimately determine the outcome of a case. End Comment)

¶18. (C) In response to a question on double-jeopardy, Halimi confirmed that a criminal defendant who was acquitted by the primary court could, on appeal by the AG's Office, be found guilty by either the lower appellate court or the Supreme Court. He denied that an acquitted defendant would continue to be incarcerated until all appeals were resolved. According to Halimi, the acquitted defendant would be released, but reincarcerated if his case were reversed on appeal. (Note: We believe conflicting information we have received on this point is likely more accurate. See para 11.)

¶ 9. (C) Referring to the Court's constitutionally mandated responsibilities for recommending appointment of lower court judges to the President and regulating the appointment, dismissal, promotion, and compensation of all judicial officials and administrative personnel, Halimi said that the full Court meets every Wednesday to consider these administrative matters as well as the occasional high-profile case.

The Academics Say...

¶ 10. (U) Kabul University's Law School Dean told us in a December meeting that, like the U.S. Supreme Court, the Afghan Supreme Court functions as an interpreter of the Constitution - a true Constitutional Court - and grants or denies certiori (review) to cases on appeal based on the constitutional issues involved. He also said, however, that the Court, as a final appellate body, is not limited to questions of constitutional interpretation and could "at its own discretion" review cases that did not pose a constitutional question. When asked what criteria might inform the Court's discretion, a senior lecturer at the Law School who has studied in the U.S. said the justices' clerks would review the lower court files for possible error. If they did not think there was any error, they would recommend that their justice affirm the lower decision. Our Law School contacts confirmed there is no official mechanism to inform the lower courts of Supreme Court decisions.

And The Legal Bureaucracy Says...

¶ 11. (C) Embassy officials have received inconsistent accounts of appellate jurisdiction and procedure from AG and MOJ contacts. Some have told us that all cases are automatically appealed - and all appeals automatically granted - as a matter of law all the way up to the Supreme Court and that each level of appeal involves a complete trial de novo; some have indicated that appeals are automatic only to the first appellate level; some have indicated that no appeals are automatic and the appellant has an affirmative duty at every level to request the appeal. None have told us that having their appeal "heard" by the Supreme Court depends upon their being able to demonstrate that the lower court erred in some way. And contrary to Halimi's information, our AG contacts have indicated that a criminal defendant frequently continues to be incarcerated pending appeal even after being acquitted by the primary court. (Comment: In an environment where people may be difficult to contact, summon, or re-arrest, keeping them in jail in spite of acquittal is seen as common sense. End Comment)

Supreme Court's Jurisdiction Still Unsettled

¶ 12. (C) The Afghan Supreme Court's role as a constitutional court is ambiguous and a matter of dispute among some legal scholars, Afghan Members of Parliament (MPs), and government advisors. According to Article 121 of the Afghan Constitution, the Afghan Supreme Court "shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law." Some Kabul Law School contacts are certain that the Supreme Court has final authority to interpret the Constitution, but have indicated Shari'a law professors disagree. Several MPs challenged the Supreme Court's right in early 2009 to take up the question of postponing the constitutionally mandated Presidential election, saying the Court should apply the provisions of the Constitution, not "interpret" them. We heard rumors that Karzai's own inner circle had debated whether the Court had jurisdiction to postpone the 2009 election, although Azimi is widely believed

to be ready to carry out any politically-charged commission that Karzai gives him.

The "Let Sleeping Dogs Lie" Commission

¶13. (C) In a further complication, Article 157 of the Constitution provides for a presidentially appointed, "Independent Commission for Supervision of the Implementation of the Constitution." According to scholars, this article was inserted into the Constitution to ensure that the Afghan jurisprudential system protects the "Islamic character of the nation" provided for in the Preamble and nine Articles of the Constitution. Supreme Court Administrator Halimi had never heard of Article 157 and opined it was one of the articles applicable only to the interim government (It is not; Article 157 is under Chapter 11, Miscellaneous Provisions of the Constitution). A senior lecturer at the Law School confirmed to us that Article 157 could, if enacted, create a body that would compete with the Supreme Court as a constitutional court and threaten the establishment of a unified, formal justice system. Afghan politicians and legal commentators periodically raise Article 157 in the media, he said, but President Karzai does not want to undermine the primacy of the Supreme Court and has refused to establish the Commission.

A Cacophony of Justice

¶14. (C) Kabul University Law School professors told us they consider the religious/secular bifurcated system of legal education and training one of the biggest problems facing the Afghan judicial system. One professor explained that students coming into the University are assigned to either the secular Law School or the religious Shari'a Law Faculty based on entrance exam scores, with those scoring highest sent to the Law School and those scoring lowest to the Shari'a faculty. There is currently no formal cross training or curriculum sharing, although the Law School is trying - against stiff Shari'a Faculty opposition - to devise at least one combined course for students of both schools next year.

¶15. (C) In addition - and as the current make-up of the Supreme Court illustrates - our contacts told us that judges at all levels are drawn largely from the Shari'a faculty whereas graduates of the secular Law School usually become attorneys. The upshot of this parallel system, they lamented, is that lawyers and judges are trained in completely different systems of law. Consequently, an already incoherent formal justice system is riddled with unpredictability and inconsistency. (Note: Professors also mentioned the "traditional justice system" as yet another obstacle to the establishment of a functioning, formal system. "Traditional" law is not identical to Shari'a although it may contain elements of it. It is based on tribal traditions, may vary in substance and application from area to area, and is the only form of justice available to most Afghans outside the capital. End Note)

¶16. (C) Considering the inconsistent information we continue to receive from Afghan interlocutors, it is clear there is little common understanding or agreement among Afghan academics or legal practitioners regarding even fundamental issues of procedure and jurisdiction in a formal justice system. This is due largely to the unresolved status of the Supreme Court as the final interpreter of law under the constitution and the parallel legal educational systems that institutionalize this ambiguity. In addition, the Court is unable to effectively disseminate and enforce its decisions. This results in an absence of guiding precedent for the lower courts and undermines respect for the formal system itself.

¶17. (C) President Karzai is unlikely to risk provoking Article 157 proponents by changing the balance of the Court to one of secular-educated justices. Two of the three

ten-year term judges who will outlast his administration are from the secular school, so he will probably maintain the current mix and appoint more Shari'a judges during his tenure. This strategy may deliver the decisions he needs politically, but it will not address the underlying philosophical split which runs like a fault line through the entire nascent formal justice system of Afghanistan.

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